STRAITS SETTLEMENTS LAW REPORTS.

PUBLISHED BY AUTHORITY.

[PRIVY COUNCIL]

LORD ATKIN, LORD THANKERTON, SIR GEORGE LOWNDES.

July 21, 1933.

EWE KEOK NEOH.....Appellant.

vs.

NG AUN THYE.....Respondent.

[PENANG CIVIL SUIT No. 746 OF 1930]
[PENANG CIVIL APPEAL No. 13 of 1931]
[PRIVY COUNCIL APPEAL No. 99 OF 1932]

Administration of Estate — beneficiary having mortgaged his whole interest in the Estate — right to account.

When a beneficiary in the estate of a decedent has transferred to mortgagees the whole of his interest in the estate—any right to account which he might otherwise have had against the executrix can only be enforced by the mortgagees and not by the beneficiary himself. Until the estate has been fully administered the beneficiary has no property in any specific investment forming part of the estate or in the income from any such investment. There is nothing which a beneficiary could assert to be or to represent his share, the whole both corpus and income being the property of the executors for purposes of administration. *Barnardo's Homes* v. *Income-tax Special Commissioners*, (1921) 2 A.C. 1 approved.

APPEAL by special leave to the Privy Council from a judgment of the Penang Court of Appeal (Murison, C. J. and Terrell, J., Thorne, J. dissenting) dated the 14th March 1932 dismissing with costs the appeal of the appellant against a judgment and order of Whitley, J. dated the 29th September, 1931.

The facts so far as they are material to this report appear sufficiently from the judgment below.

L. L. Cohen & R. T. Gibson for the Appellant.
Cyril Radcliffe for the Respondent.

Cur. Ad. Vult.

SIR GEORGE LOWNDES.—The only question in this appeal is whether the respondent is entitled to an account of the income and expenditure of the estate of one Ng Boo Bee from 24th September 1921 to 23rd August 1929. The facts so far as it is necessary to state them here are not in dispute. Ng Boo Bee, who may be referred to for convenience as the testator, died on 24th September 1921 leaving a will dated 6th September of the same year, of which probate was granted to the appellant as sole executrix and trustee. The will provided that (subject to certain pecuniary bequests) the estate should be divided into 88 shares of which 12 were to go to the respondent, the eldest son of the testator, 10 to the appellant his widow, and 36 to other children and grandchildren. The remaining 30 shares were left to the appellant upon trust to accumulate the income for ten years after the testator's death and then to divide the capital and accumulated income amongst the children named in the will as she might consider just and proper.

In the year 1923 the respondent took certain proceedings in the Supreme Court of the Straits Settlements against the appellant, apparently in connexion with her administration of the testator's estate. These proceedings were compromised by an agreement dated 17th March 1924. The parties to this agreement were (1) the appellant as executrix and trustee of the will and also in her individual capacity, (2) the respondent, and (3) the other beneficiaries, some of whom were then minors.

The operative part of the agreement in which the appellant was referred to as "the executrix" and the estate of the testator as "the trust estate" included the following amongst other provisions: By Cl.1, that on approval of the settlement by the Courts, the appellant should transfer to the respondent absolutely a certain rubber estate and other land and (Cl.4) should pay him the sum of $2,000 to be debited against his share of the trust estate. By Cl.2, that the appellant should raise as soon as possible a sum of $70,000 on the security of the estate and out of the money so raised should pay off two charges created by the respondent over his share; that in the event of any principal or interest due under any charge or mortgage so made by the payment having to be paid out of the estate, owing to the failure of the respondent to pay the same, the amount so paid together with interest thereon at 8 per cent should be debited against the respondent's share of the estate. By Cl.3, that upon the appellant paying off the sums due under the two charges created by the respondent he should charge in her favour the share of the trust estate to which he was entitled to the extent of the amount so paid by her, such charge not to be repayable for three years from the date of execution. By Cl.6, that the appellant should cause accounts of her trusteeship to be kept in English in proper and usual manner and have them audited by a qualified accountant at least once every six months and should regularly submit such accounts together with the auditor's report to the beneficiaries. By Cl.11, that until distribution of the 58 shares the appellant should make the following monthly payments:

> "To the eldest son the sum of Dollars four hundred ($400/–) which shall be credited to him in respect of the twelve shares in the trust estate bequeathed to him but no part of such monthly sum shall be paid to the eldest son until repayment has been made of the mortgage or charge to be executed by the eldest son referred to in para. 3 hereof. Until such repayment all the said monthly payments of Dollars four hundred ($400/–) shall be

applied in part payment of the interest payable on the said mortgage or charge to be executed by the eldest son and the remainder of such interest shall be paid by the eldest son out of the revenue of the said 'Swee Thye' rubber estate. Provided and it is hereby agreed that in the event of the revenues of the trust estate being insufficient to meet the monthly payments in this paragraph agreed to be made then such monthly payments shall be reduced proportionately in each case and shall be accepted by all parties concerned in full satisfaction of their respectively monthly payments."

The terms of this settlement were approved by the Court, and the mortgage provided for by Cl.3 was, on 19th August, 1925, executed by the respondent who as mortgagor thereby conveyed assigned and transferred to the appellant "all that his 12 out of 88 shares under the will of the "testator." On 1st September 1926 the respondent executed a second mortgage of his 12/88ths share in favour of one Ramasamy Chettiar for $25,000 and interest. The prior mortgage in favour of the appellant was recited and the operative words were similar. On 23rd August 1929 the respondent being in default, the second mortgagee exercised his statutory power of sale and conveyed the mortgaged shares (subject to the first mortgage in favour of the appellant) to one of the brothers of the respondent. The validity of this sale is not disputed. On 24th December 1930 the respondent commenced the proceedings out of which the present appeal arises. By his statement of claim (to which the appellant was the only defendant) he claimed administration and accounts of the estate of the testator and the appointment of a new trustee or trustees in her place. The material plea in defence was that having regard to the transactions above referred to the respondent had no interest in the estate, and it is, their Lordships think, upon this question that the decision of the appeal must turn.

At the trial, the prayer for administration was abandoned and accounts were claimed only up to 23rd August 1929 the date of the mortgagee's sale. The suit was tried in the Supreme Court before Whitley, J. He seems to have regarded the respondent's interest in the testator's estate as consisting of a 12/88th share of the corpus upon which a proportionate amount of the income was payable to him by the appellant. He was of opinion that only the 12/88th of the corpus was the subject of the mortgages and that the respondent remained entitled to the interest until the second mortgagee exercised his power of sale. He accordingly held that the respondent was entitled to an account of the income and expenditure to that date. The prayer for appointment of a new trustee was refused. The claim for accounts had also been supported in the trial Court by reference to the purely contingent interest of the respondent in the 30 residuary shares of the estate, but this contention was not pressed and was definitely negatived by the learned Judge. It has found no place in the argument before their Lordships.

Upon appeal, the case was heard by a Bench of three Judges. Murison, C. J., and Terrell, J., in effect agreed with the trial Judge, holding that only the corpus of the 12/88th share passed to the mortgagees, leaving the respondent still entitled to the interest, and the appeal was accordingly dismissed with a merely formal correction of the date to which the account was to run. Thorne, J., dissented and would have allowed the appeal. In his opinion, the respondent was only entitled to 12/88ths of the net proceeds of realisation of the testator's estate and had no right to income as such prior to distribution. He thought that the whole passed to his mortgagees and that after the sale of 23rd August 1929 he had no interest which would support the claim to an account. Their Lordships think that this was the right view. The bequest of the respondent was of a 12/88th share of the residue of the testator's estate, and until the residue was ascertained there was no fund to which he was entitled or the income of which he could claim. The whole was vested in the executrix for the purposes of administration. At the close of the administration he would be entitled to receive his 12/88ths of the residue consisting of capital and accumulated income. So in *Barnardo's Homes* v. *Income-tax Special Commissioners*, (1921) 2 A.C. 1; 90 L.J.K.B. 545 Lord Cave states, at p.10:

> "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purpose of administration."

This would undoubtedly have been the position apart from the agreement of 17th March 1924 and the respondent's mortgages would necessarily therefore have comprised the whole of his interest in the estate. Nor do their Lordships think that the position was in any way altered by the agreement. It clearly regarded the estate as still under administration; there is no suggestion that the residue has been ascertained, and the date of distribution is in effect postponed, at all events, for three years. The

agreement that there should be monthly payments to the beneficiaries until distribution is not inconsistent with this view; nor the proviso that in the event of the revenues of the estate being insufficient to meet them they should be proportionately reduced. It was only an arrangement for interim payments on account which would not unnaturally find a place in any agreement postponing the date of distribution. For the respondent it was contended that the effect of the agreement was to constitute the appellant as from 17th March 1924 a trustee for each beneficiary of specific shares in the residuary estate, the income of which would be payable to him, and for which the appellant would be accountable to him. This seems to have been the view of Terrell, J., but their Lordships are unable to accept it as correct. Reading the agreement as a whole, they think that it effected no change in the relationship of the appellant to the beneficiaries. Until the date of distribution arrived there was nothing which the beneficiary could assert to be or to represent his share, and nothing of which he could claim the income; the whole remained vested in the appellant as executrix for the purposes of administration.

It was also suggested in support of the majority judgments that the respondent was entitled by contract, apart from his right as a beneficiary, to his account under Cl.6 of the agreement, which is summarised above. But this was not the basis of the respondent's claim in the Supreme Court and if, as their Lordships hold, the respondent's whole interest in the estate passed under his mortgages it would seem that the right to the account could only be enforced by his transferees. A claim under Cl.6 of the agreement would be in the nature of a claim to specific performance which a Court of Equity clearly would not grant to a plaintiff who had no remaining interest in the estate. A last attempt was made to support the claim upon the respondent's rights as a mortgagor against his mortgagee. But here again it is manifest that this was not the nature of his claim; a suit for a mortgage account would be of an entirely different nature. His equity of redemption was gone and all he could claim against the appellant was the monthly credit of $400 under Cl.11 of the agreement which admittedly had been made. For the reasons above given, their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgments of the trial Court and the Court of Appeal set aside and the action dismissed. The respondent must pay the appellant's costs throughout.

Appeal allowed.

Solicitors for the Appellant—*Logan, Ross & Samuel*, Penang; *Lattey & Dawe*, London.

Solicitors for the Respondent—*Wreford & Thornton*, Penang; *Shelton Cobb & Co.*, London.

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

August 4, 1933.

[APPELLATE CIVIL JURISDICTION]

HUGGARD, C.J., THOMAS, C.J. (F.M.S.), and GERAHTY, J.

November 20, 1933.

RE ANG TECK SAY.

[SINGAPORE BANKRUPTCIES Nos. 609 & 610 of 1931]

[SINGAPORE CIVIL APPEAL No. 12 of 1933]

Ordinance No. 44 (Bankruptcy) S.114(b)—Motion to commit Bankrupt for not producing books of account, when called upon by the Official Assignee to do so.

The obligation of a Bankrupt to produce the books of account required by S. 114 (a) and (b) of Ordinance No. 44 (Bankruptcy) is an unqualified obligation and if not fulfilled renders the Bankrupt liable to the penal consequences of the section, subject only to the proper exercise of the discretion vested in the Judge to award imprisonment. In considering whether or not a Bankrupt should be committed to prison for failing to produce his books the Court should confine itself to considering only the facts and circumstances relating to the failure to produce those books.

Motion.

The Official Assignee moved for an Order under Ordinance No. 44 (Bankruptcy) S. 114 that the Bankrupt do undergo imprisonment on the ground that the Bankrupt had not produced under subsection (b) of that Section the books required to be kept under subsection (a) of the same section.

C. Wilson (Official Assignee) and Assistant Official Assignee.

D. K. Walters for Respondent (the Bankrupt). Section 114 of Ordinance 44 (Bankruptcy) is penal, (*In re Chop Lo Ban Chuan and Chuan Bee*, Penang Bankruptcy No. 45 of 1924, referred to in Braddell's Law of the Straits Settlements Vol. 2 page 27) and must be construed strictly. It is not the intention of Section 114(b) to punish the Bankrupt for what he is not in a physical position to do. "*Lex non cogit ad impossibilia.*" Compare Section 158(i) of the Bankruptcy Act 1914. Under the English law a Bankrupt is conditionally liable to keep proper books of account and to "preserve" all books of account so kept. Under our section a Bankrupt is liable to keep proper books of account and to "produce" such books. If a Bankrupt deliberately destroyed his books he might be liable under other provisions of the law, but under section 114(b) the obligation is only to produce his books if he has them. If the Court is satisfied that the Bankrupt is not in a position (at any rate when this is not due to any fault of his) physically to produce his books he cannot or at least ought not to be committed under Section 53 of Ordinance 44 (Bankruptcy).

Cur. Ad. Vult.